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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 226

VIRGINIA C. SHAFFER,
Appellant,
vs.
ANITA VALTIERRA, et al.

On Appeal from the United States District Court for the Northern District of California

Reply Brief of Appellant Virginia C. Shaffer

MOSES LASKY
BROBECK, PHLEGER & HARRISON
111 Sutter Street
San Francisco, California 94104
Attorney for Appellant Virginia C. Shaffer

Of Counsel:
MALCOLM T. DUNGAN
111 Sutter Street
San Francisco, California 94104

SORG PRINTING COMPANY OF CALIFORNIA, 345 FIRST STREET, SAN FRANCISCO 94105

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Reply Brief of Appellant Virginia C. Shaffer

Appellant replies to 3 briefs totalling 132 pages, those of (1) appellees Valtierra, et al. (the plaintiffs) and (2) the Housing Authority of San Jose, and (3) the *amicus* brief of the Attorney General of New York.[1]

All emphasis in quotations in this brief has been added unless otherwise noted.

1. Hereafter referred to, respectively, as "Valtierra", "Housing Authority" and "N.Y."
The notation "O.B." refers to appellant Shaffer's opening brief.

The Housing Authority was a defendant below, not a plaintiff, but now styles itself as "appellee" and seeks affirmance of the *judgment against it.*[2] The interest of *amicus* is enigmatic.[3] To reply to the several briefs *seriatim* would be repetitious. We shall endeavor to extract from them a series of intelligible propositions and then answer them.

I.

THE ISSUE IN THIS CASE IS NOT HOUSING. IT IS WHETHER CONSTITUTIONAL LAW IS TO CROSS A CONTINENTAL DIVIDE INTO A NEW WATERSHED RADICALLY ALTERING OUR DUAL SYSTEM OF GOVERNMENT AND SUPPLANTING VOTER DETERMINATION BY JUDICIAL DECISION

With copious citation of current literature and with masses of statistics from a variety of unauthenticated sources, our adversaries tell us, often persuasively, of the need of low income housing in the United States, of the unfortunate plight of fellow Americans disadvantaged because of color or descent, of the damage to persons and personality from ghetto living. They even re-wage old battles by talking of discrimination in the sale and rental of real estate (e.g., Valtierra, 25, 26). In a proper forum we might agree with much of that presentation. Our adversaries then proceed to tell us that, in order to achieve desirable social goals, low-income *public* housing should not be subject to voter

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2. Pointing to the fact, among others, that the Housing Authority had not contested the case against it below and had not appealed, our opening brief said that this was a feigned case (O.B. 28). The appearance of Housing Authority in this Court as an appellee confirms our statement.

3. Since the *amicus* brief was filed November 5, 1970, ten days after expiration of the time for filing appellees' briefs, it seems too late under Rule 42(2). But it adds nothing, and we answer it in stride, although it is difficult to see what genuine interest the Attorney General of New York can have in a provision of the Constitution of California. His explanation for tendering a brief is that "opponents of public housing in other States may be encouraged" to adopt similar provisions (N.Y.2). Thus the Attorney General of New York distrusts the general voters of his State and asks this Court to forestall them from action unpalatable to those who have his ear.

review. That too may—or it may not—be so. We decline to debate that queston in this case because it is not an issue here, and this is not the forum in which to present it.[4] That question is a political or legislative one, and the proponents of its two—or several—sides should put their case to the people of California to repeal, amend, or retain the State Constitution.

The issue in this case transcends public housing. We submitted in our opening brief (O.B. 25):

> "The assault on Article XXXIV is a manifestation of a new distrust of democracy and democratic processes in favor of an elitism that considers itself a wiser guide for the solution of the economic and social problems of the republic, an elitism contemptuous of the wisdom and fairness of [the] ordinary voter."

Our adversaries' briefs confirm that submission. What they contend is that, *as a matter of constitutional law, voters are to be held inherently disqualified from passing on certain kinds of issues.* Step by step this will spread from some issues to *all* issues. The voters are accused of being biased and unworthy to pass on important questions better left to wiser heads! Valtierra asserts (p. 27):

> "Article 34 has no other coherent function or inevitable effect than to authorize and invite a racial veto within the administration of a governmental housing program. It is accordingly unconstitutional."

Housing Authority (p. 38) argues that to allow local voter control is to work against the best interests of the locality, because local governing bodies and housing authorities have determined

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4. Our adversaries constantly overlook statements of our opening brief like this:

> "We note the several methods, *not to tender any view of our own that one is better than another, but to say that voters may legitimately think so, wholly divorced from racial prejudice, and it is reasonable to let them be heard at the polls.*" (O.B. 42; emphasis in original)

what is good.[5] Valtierra states (p. 68) that it does not ask that the "Court review the mental processes of voters at particular referenda, to determine whether they voted for constitutionally forbidden reasons" but that to allow the electorate to vote at all is to make it possible for a racial determination to occur. Ergo, it is unconstitutional to let the electorate vote. Ergo, the decision is to be reserved to a wiser elite!

The argument is that the electorate acts in ways wholly capricious, not governed by any ascertainable standards. But that is equally true of the electorate whenever it votes, for any candidate or on any measure. Is democracy then unconstitutional? By this logic, to allow legislators to vote is also to permit a racial determination under pressure or attraction of influences. The inevitable end of the logic is that all decisions are to be reserved to the courts as the only repository of trustworthy authority.

To support this argument reference is had to cases where unbridled discretionary authority without limiting standards has been conferred on *administrative officials* and exercised consistently to bar minorities from voting or the like[6] (Valtierra, 68). Such cases have no relevance, and for two reasons. In the first place Article XXXIV has not remotely approached exclusion of all low-income housing. As already seen (O.B. 28, 29), sixty-nine percent (69%) of all elections under Article XXXIV from 1950 through June 1968 resulted in approval of the housing project, eighty-four

5. A younger generation would phrase that as "father knows best" and resent it.

6. In *Louisiana v. United States,* 380 U.S. 145 (1965), a statute conferred on the registrar of voters absolute power to exclude from the vote anyone who could not "give a reasonable interpretation" of any section of the state or federal constitution "when read to him by the registrar", and all registrars applied the test so as to keep Negroes from voting. In *Yick Wo v. Hopkins,* 118 U.S. 356 (1886), the ordinance provided that no laundry in a wooden building could be operated within the city without permission of a board which permitted *all* whites and denied permission to *all* Chinese.

percent (84%) did so from 1968 to 1970, and of 8 on the ballot at the time of the San Jose vote 7 were approved.

More fundamentally, the cited cases have no relevance because *the electorate cannot and must not be assimilated to administrative officials.* The motives of voters are not to be examined by courts; the right to vote is not to be denied because of fear that voters may act unwisely or discriminatorily. Local government is the pervasive characteristic of our republic. The very cases our adversaries cite contain statements by this Court that the right to vote "rank[s] among our most precious freedoms" and that "other rights, even the most basic, are illusory if the right to vote is undermined" (*Williams v. Rhodes,* 393 U.S. 23, 30, 31 (1968)). And this Court has recognized that "virtually every American lives within what he and his neighbor regard as a unit of local government with general responsibility and power for local affairs" (*Avery v. Midland County,* 390 U.S. 474, 483 (1968). In *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886), the Court distinguished between administrative bodies and the people themselves, saying:

> "* * * we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, *sovereignty itself remains with the people, by whom and for whom all government exists and acts.* And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means *of the suffrage."*

Compare this judicial statement with the inverted theory of N.Y. 9 that "California has in effect entrusted its zoning powers to private persons and groups"! Thus the sovereign's retention of a power is assailed as an unconstitutional delegation by the sovereign's agent to the agent's principal!

The logical end of the road our adversaries ask the Court to enter—the road of judicial examination of voter motives or of interdiction of reference to voters—is the substitution for our republican form of government of judicial rule.

Here, as elsewhere in their arguments, when their reasoning brings them starkly up against the logical end, appellees recoil, in words, but not in substance. Thus Valtierra (p. 68) states:

> "We do not urge that all referenda in public housing matters would be invalid for this reason. Nor does our submission seek to have the Court review the mental processes of voters at particular referenda, to determine whether they voted for constitutionally forbidden reasons."

Instead, what Valtierra asks is the more sweeping interdiction of any referendum for low-income housing because, forsooth, the voter is to be deemed untrustworthy in that area.

An Article XXXIV election is a step in the legislative process, the last in a series necessary to put into effect a low-rent public housing project in California (Valtierra, 6-12 describes most of these steps). The proffered basis for holding Article XXXIV violative of the Equal Protection clause is that there is a necessary effect inherent in the fact that decisions are to be made and that those who make them *may* be actuated by improper motives. That effect and possibility are as inherent in each of the chain of prior decisions—the decisions of the City Council to approve the project, to approve the application for a preliminary loan, and to enter into an agreement for local cooperation, and in a still earlier requirement that, although a housing authority is automatically created by State law in every city and county, it may exercise no powers until the local governing body declares that

there is need for it to do so.[7] Unless the Court is willing to hold that, upon a finding by a three-judge court that there is a need for low-cost housing in the State or a particular city or county, it could (a) order the legislature of California to accept the Federal offer of housing aid and the voters not to reject the legislation, (b) dictate the details of the State enactment, (c) order a Housing Authority into existence whether the local governing body finds a need for it or not, (d) order the local governing body not to disapprove a particular project if the court finds it is a needful one, then there is no logical basis to hold that a requirement of local voter approval violates the Constitution.

On the contrary, there is a sanctity about the electoral process inherent in the American system that cloaks the right of the voter with an invulnerability none of the other steps possesses. In *Williams v. Rhodes,* 393 U.S. 23, 39 (1968) Mr. Justice Douglas remarked:

> "I would think that a State has precious little leeway in making it difficult or impossible for citizens to vote for whomsoever they please and to organize campaigns for any school of thought they may choose, whatever part of the spectrum it reflects."[8]

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7. Compare Winston W. Crouch, The Initiative and Referendum in California (The Haynes Foundation, Los Angeles, 1950):

> "Persons seeking to prevent a measure introduced in the legislature from becoming law have several opportunities to achieve that result. In the first place the bill may be defeated or materially altered in committee. Failing this, opponents may carry the fight to the legislative chamber. Furthermore, opposition is not confined to one house. All tactics may be duplicated as the bill proceeds through the second house. After a bill has passed both houses opponents may still seek to persuade the governor to veto it. This is the normal course of legislative opposition.
>
> "The referendum stands as the last-resort check upon the legislature."

8. In *Hadnott v. Amos* (U. S. D. C., M. Ala., Oct. 19, 1970), 39 L. W. 2263, a three-judge court said: "His [the voter's] qualifications are minimal, and he need not subject himself to the scrutiny of anyone in the performance of his role in selection of public officers."

Nothing Is Here Claimed to Violate "Equal Protection" Except the Provision for Referendum Itself

Our adversaries avoid the issue by a diversionary argument. They argue that the fact that voters, instead of legislators, adopt legislation does not immunize it from the 14th Amendment, that constitutional rights cannot be infringed simply because a majority of the people choose so.[9] We agree: An enactment that would violate the Equal Protection Clause if enacted by a state legislature will violate it if enacted by the people. Our opening brief said (O.B. 55):

> "*Hunter v. Erickson* tells us that a 'legislative structure which otherwise would violate the Fourteenth Amendment is not immunized by popular referendum' (p. 392). But that is not this case. *Here it is not claimed that anything violates the Fourteenth Amendment except the provision for referendum itself! Hunter v. Erickson* also reminds us * * * that the 'sovereignty of the people is itself subject' to constitutional limitations on the State. That principle, as *Hunter v. Erickson* itself applies it, reaches a rearrangement of the distribution of legislative powers on racially discriminatory lines. That is not this case either."

None of our adversaries meets this statement, that what is here claimed to violate the 14th Amendment *is nothing but the provision for referendum itself.* In short, it deflects reasoning to say that acts of the electorate may be unconstitutional. *The question in this case is whether the mere requirement that a question be put to the electorate violates the Constitution.* And that question strikes even deeper. The final control and the direct voice of the electorate are of the very bone of democracy

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9. Thus N.Y. (9) cites *Lucas v. Colorado General Assembly*, 377 U.S. 713 (1964), which held that a violation of the one-man one-vote principle is not immunized because effected by popular initiative.

in California. In no other State is this so true. Winston W. Crouch, "The Initiative and Referendum in California",[10] points out:

> "The electorate of this state has been accustomed to expressing itself on matters of state and local policy since the state government was first established. The first constitution, adopted in 1849, * * * required all constitutional amendments to be submitted to the people in a manner prescribed by the legislature. It also directed that state bond debt proposals be presented to the voters, and required approval, by a majority of the vote cast, for adoption of these proposals. * * * Furthermore, between 1873 and 1876 the state permitted townships and cities to have local option on liquor licenses. The 1879 constitution went even further. Cities, counties, and school districts were prohibited from incurring indebtedness unless two-thirds of the voters casting their ballots agreed to the proposal.
>
> * * *
>
> "Many features of direct legislation had their origin in city government. * * * Municipal home rule, which was instituted in this state by the second constitution, did a great deal to extend the principles of direct legislation. In the first place, a city charter drafted by a local freeholders' board was to be submitted to the city's voters. Secondly, all amendments to the charter had to be submitted in a similar manner. * * * [p. 2]
>
> * * * * *
>
> "By and large, however, California has been a leader in the development of this form of legislative process. * * * [p. 4]"

What appellees ask, therefore, is for this Court to strike at a basic characteristic of democracy in California.

The Effect on the Judicial Process

We submitted (O.B. 56-60) that the course upon which our adversaries seek to have the courts embark is to inquire whether

10. Published, 1950, by The Haynes Foundation, Los Angeles. Dr. John R. Haynes was a leader in the direct legislation movement in California from 1901, which gained strength when Hiram W. Johnson was elected governor in 1910.

the structure of State government makes it more difficult for one "group" to obtain advantages than another and to analyze different forms of governmental structure to the end of determining which is more likely to be equally attuned to the demands or needs of all groups into which the citizenry falls. Among other unfortunate consequences, that task will embroil the courts in an inspection and comparison of the infinity of statutes of any State under review.[11]

If this kind of judicial inquiry is opened up or condoned, the trial of the issues *will go in either of two directions.* Either they will be long and endless in the trial court with numerous economists, sociologists and statisticians called to the stand and subjected to cross examination. *Or else they will take the more unpardonable course this case has taken:* the course, in the court below, of a *summary procedure* with no evidence adduced but *ex parte opinion* affidavits; then, in this Court, an outpouring in briefs of citations to the writings of so-called experts and special interest groups, not only with no one subjected to cross-examination but with no issues framed by discovery and with an appellant forced to respond in a reply brief to theories never propounded below.

II.

ARTICLE XXXIV DOES NOT DISCRIMINATE AGAINST RACE OR POVERTY; THE DOCTRINES OF "FUNDAMENTAL RIGHTS" AND "COMPELLING STATE INTERESTS" HAVE NO VALID APPLICATION TO THIS CASE, AND THE CASE IS GOVERNED BY DANDRIDGE V. WILLIAMS

In *Dandridge v. Williams,* 397 U.S. 471, 485, 486 (1970), this Court reaffirmed this test of constitutionality under the equal protection clause:

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11. One hardly need look beyond Valtierra's reference (47) to such things as the building of municipal auditoria, parking garages, ballfields, etc., and to the use of private property for tax exempt uses like churches, museums and colleges, to perceive the endless task of comparison our adversaries would impose on the courts.

> "In the area of economics and social welfare, * * * [i]f the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality' * * *. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it * * *.' [T]he Fourteenth Amendment gives the federal courts no power to impose upon the states their views of wise economic or social policy."[12]

The foundation of our adversaries' entire argument is the claim that this basic principle is supplanted by the standard of "compelling state interest" because, somehow, Article XXXIV affects "fundamental rights". This claim rests, in turn, on a contention that Article XXXIV discriminates against race or *against* poverty, and that the latter, like the former, is a "constitutionally suspect" classification. Even *if* the "compelling state interest" test *were* applicable, we submit that California's traditional use of direct democracy satisfies that test. But that is not the applicable test, as we now see.

A. Article XXXIV Is Not Racial Legislation: Race Is No Part of This Case

Valtierra admits that Article XXXIV "does not speak in terms of race" (p. 63). Housing Authority concedes, grudgingly, that it "does not expressly classify on the basis of race" (e.g., Housing Authority, 9). Our opening brief pointed out that the disposition of this case on summary judgment precludes any adverse inferences of motives or purposes (O.B. 18). We find in our adversaries' briefs no open challenge to that statement. Yet all our adversaries try to convert this case into one involving racial discrimination. That effort is corruptive of reasoning.

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12. On this basis the 7th Circuit on September 16, 1970, in *Money v. Swank*, 39 L.W. 2181, rejected the claim that a State welfare provision granting educational allowance for vocational school students but not to college students denied equal protection.

If the "poor" were white, the constitutionality of a law affecting them, *qua* "poor", would be determined by certain criteria. Is it to be determined by a different criterion because the "poor" also happen in measurable part to be black or Spanish speaking? And is that different criterion one that presumes constitutional guilt instead of constitutional innocence? We submit not. Race and color may not be badges of inferiority *under the law;* they may not be instruments by which the law oppresses or discriminates. But neither are race or color talismans whose coincidental presence works special favorable treatment.

No person fits into only one category. Every person falls into numerous categories, denoted by color, race, education, wealth, occupation, religion, etc. If a law operates upon a person by virtue of his relation to one of these categories, other than that of race or color, the coincidence of his also being black should not alter the tests by which to determine the law's constitutionality. This is not to say that a statute *whose very purpose* is to discriminate racially may escape constitutional condemnation by cleverly disguising it in phraseology; it will be judged by its intended purpose. But the fact that those who come into contact with the law in one capacity also fit into another category does not make the latter the touchstone of the law's validity. Article XXXIV is no less constitutional than it would be if there were fewer blacks or Mexican-Americans in California or none at all.

None of our adversaries contends that persons of racial minorities comprise the bulk of the poor in California. They assert only that they comprise "a disproportionately" large segment of the poor (e.g., Housing Authority 24; Valtierra 66), a plastic expression. The bulk of the poor in the County of Santa Clara, in the City of San Jose, and in the State of California are white.

Cases like *Yick Wo v. Hopkins,* 118 U.S. 356 (1886), *Reitman v. Mulkey,* 387 U.S. 369 (1967) and *Gomillion v. Lightfoot,* 364 U.S. 339 (1960), do not support our adversaries in their effort to

make out Article XXXIV as racial legislation. In *Yick Wo all* Chinese laundries were excluded from San Francisco, and *no* Caucasians were. In *Gomillion* all but 4 or 5 of 400 Negroes in the city and not one white were excluded from voting by a gerrymander; the case came up on demurrer admitting the allegation of the complaint that the purpose was to discriminate racially. Nor is it true that in *Yick Wo* or *Reitman* the legislative provision was "completely neutral on its face" (Housing Authority, 25, Valtierra, 66, 67). The Court emphasized in *Yick Wo* that on its face the ordinance was defective in laying down no standard (see p. 4, supra). In *Reitman* the express purpose on the face was to prohibit legislation against racial discrimination. Cases like *Gomillion v. Lightfoot,,* supra, and *Cipriano v. Houma,* 395 U.S. 701 (1969) are cases *where fencing out some voters from voting was held unconstitutional; they are no authority for holding that all voters must be fenced out.*

B. Article XXXIV Does Not Discriminate Against Poverty; It Does Not Deprive Anyone of Any "Fundamental Right"

All our adversaries expatiate about "fundamental rights" or "fundamental interests". That phrasing simply erects a curtain of words between fact and reason. And a ray of candor appears in Housing Authority at p. 29 when it concedes that it

> "must candidly say that in the cases in which this Court has applied the compelling state interest test because the classification was based on wealth, a fundamental interest of the poor was also at stake."

It then asks the Court to pronounce new constitutional law, either that a "fundamental interest" is not "a prerequisite to the compelling state interest test" or else that "decent housing is a fundamental interest of the poor."

Students of jurisprudence know that the word "right" is a slippery one covering a multitude of diverse notions.[13] There are, indeed, "fundamental rights" that one possesses because he is a citizen, such as the right to vote,[14] or that he has because he is an inhabitant of the land, such as the right not to be deprived by governmental authority of life, liberty or property without due process. The State cannot deny a person a *right*, common to all and unrelated to poverty, such as the right to vote or the right to travel, because he is poor. But this case involves no situation of denying a right *because* of poverty. What we have here is something entirely different. Poverty is a fact which creates a *need*. Those lacking poverty lack the need. It does not discriminate in favor of those lacking the need and against those who have the need to prescribe the manner in which governmental authority is willing to satisfy that need. In our opening brief we phrased the matter thus:

> "indigency is a social, economic and political situation to which government must give its attention, or at least rightfully may do so. And to do so is not to discriminate unconstitutionally. In turning its attention to this subject, a State has wide freedom to determine what it should do and how it should do it." (p. 43)

In the passage from *Edwards v. California*, 314 U.S. 160 (1941), quoted in Housing Authority 27, 28, Mr. Justice Jackson said:

> " 'Indigence' in itself is neither a source of rights nor a basis for denying them."

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13. IV Roscoe Pound, Jurisprudence (West Publishing Co., St. Paul, 1959, § 118, p. 56, "There is no more ambiguous word in legal and juristic literature than the word right."

14. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886):
"There are many illustrations that might be given of this truth, which would make manifest that it was self-evident in the light of our system of jurisprudence. The case of the political franchise of voting is one. Though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights."

In *King v. Smith,* 392 U.S. 309, 318, 319 (1968), the Court said:

> "There is no question that States have considerable latitude in allocating their * * * resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program."

Our adversaries point to the language of Article XXXIV as "expressly classif[ying] on the basis of wealth" (e.g., Housing Authority, 27) because it defines its application in terms of poverty. But the Federal Housing Act of 1937 (42 U.S.C. § 1401, quoted in full in the appendix to the Valtierra brief) does exactly that. Article XXXIV uses the language of the federal act as the clearest way to define that the *need* to which it relates is exactly that to which the Act relates.

There are *needs* which may be fundamental to existence. As civilization changes, more species of needs may come to be deemed "fundamental" and society may increasingly think it compassionate or wise to satisfy them. But that a "need" is "fundamental" does not create a "right" to have it satisfied, certainly not a "fundamental" right embedded in the Constitution. Nevertheless, it is just this telescoping of concepts that characterizes our adversaries' arguments. If housing is a necessity of life, the Constitution does not prescribe that the States must supply necessities.

Arguments that "poverty is a constitutionally 'disfavored' classification" (e.g., Valtierra, 42) are simply a gliding from one aspect of reality to a different one entirely. So are arguments based on cases like *Douglas v. California,* 372 U.S. 353 (1963), and *Griffin v. Illinois,* 351 U.S. 12 (1956), which is quoted for its statement that "there can be no equal justice when the kind of trial a man gets depends on the amount of money he has." (Valtierra, 43). It is the nature of our society that many things are ob-

tainable only by money, but others involve no money nexus. Justice is not a commodity bought and sold for money; it is the basic attribute to assure which governments are formed.[15] Because some things are beyond money does not mean that all must be. There may be a growing moral feeling about supplying to the impoverished commodities requiring money to obtain, and the time may come when the Constitution may be amended to make this a legal duty. It is not yet so.

There is a plain difference between "impos[ing] a special burden on a particular group" (Housing Authority, 13), on the one hand, and, on the other, letting the public decide the basis upon which the public will give advantages to that group.

The analogies for which our adversaries reach out in all directions show the confusion of thinking. Thus *Valtierra* (Br. 44) asserts that people have an "interest in a decent home". Then it supports that statement by arguing that, as the Constitution protects one from unlawful searches and seizures or other intrusions, it must presuppose that he "has a home whose quality is worth protecting." The Constitution does not command that such a home be given him and that anything is unconstitutional that may deflect the free flow of bounty to give him that home.

If Valtierra's kind of reasoning is valid, the whole constitutional fabric will be dissolvable in non-sequiturs of verbal confusion.

III.

ARTICLE XXXIV CREATES NO UNCONSTITUTIONAL CLASSIFICATION. IT DOES NOT DISCRIMINATE

A. Article XXXIV Is Not Unconstitutional In Providing an Automatic Reference to the Electorate

It is clear from their briefs that what our adversaries wish to outlaw as unconstitutional is *any referral* at all to voter approval. See, for example, the passages quoted at pp. 3, 4 supra. But then they fall back, as a tactical device, upon a narrower argument.

15. Compare quotation in fn. 14 above from *Yick Wo v. Hopkins.*

Valtierra casts this as a claim that referenda generally provided for in California are "review referenda" whereas the referendum of Article XXXIV is not (Valtierra, 29, et seq.). But plainly an Article XXXIV referendum is a "review" referendum, for it reviews the action of the governmental agency to which initial authority has been delegated. N.Y. (11, 12) speaks in terms of an Article XXXIV referendum occurring "before any decision can be taken," but all referenda occur after someone makes a decision but before it can be put into operation. The difference between the referendum of Article XXXIV and *some*, but *far from all*, referenda is that the housing resolution of the local governing body goes on the ballot without the intermediation of a petition to put it there. Housing Authority professes that this is what it objects to, asserting (p. 15) that it is "this unique automatic referendum requirement that makes Article 34 offensive to the equal protection clause". That, at least, is a confession that the numerous other "vices" about which our adversaries write at length are not what makes Article XXXIV unconstitutional.

This "automatic" referendum is not unique; *on the contrary, it is the earlier form in California.* Our adversaries rely on the fact that in *Hunter v. Erickson*, 393 U.S. 385 (1969), an amendment of the charter of the City of Akron providing for an automatic referendum was held to violate equal protection. But this Court was not there laying down any general proposition about automatic referenda. The essence of *Hunter* was that there

> (1) the *sole and only purpose* of the amendment was to make referenda on a particular subject automatic, for Akron already had a general referendum provision that would apply to the subject but for the amendment; and
>
> (2) the subject there singled out for different treatment solely in respect of the automatic reference was legislation outlawing discrimination because of race and color. The charter amendment repealed anti-discrimination legislation

> already on the books and required all new legislation of that type to be automatically referred. The Court noted (393 U.S. at 389) that "Here . . . there was an explicitly racial classification."

Thus in *Hunter, there could have been no other purpose but to discriminate against anti-racial legislation.* And it is elementary that, whenever one acts with a specific purpose, an inference follows that what he does is reasonably calculated to effect that purpose.

By contrast, Article XXXIV repealed nothing, and it did not replace an otherwise applicable referendum law. The very reason for its adoption was that the Supreme Court of California had just held that California's general referendum law was not applicable (O.B. 6, 7). The fact that, in the course of curing the defect, Article XXXIV differs from the general law in not requiring a petition is a difference but not a constitutional defect. *On the contrary,* when the Supreme Court of California, in *Housing Authority v. Superior Court,* 35 Cal.2d 550, 219 P.2d 457 (1950) *held that acts of local governing bodies relative to low-income housing were not subject to the general referendum requirements at all—thereby leading to Article XXXIV* (O.B. 6, 7)—it demonstrated that low-income housing fell into a *different classification.* If sufficiently different as to warrant *no* referendum before Article XXXIV, it is sufficiently different to warrant a *no petition* referendum.

The structure of government need not be the same for all types of governmental activity (O.B. 54, et seq.). We submitted (O.B. 54) that the Equal Protection clause does not forbid a "State from requiring voter approval of anything unless it requires voter approval of everything." Just so, an automatic referendum of everything is not required before there may be an automatic referendum of anything.

There are numerous examples of automatic referenda in California. It is the older form in California, long antedating the petition referendum. Crouch, "The Initiative and Referendum in California" (see fn. 7, supra) notes:

"Several types of direct legislation exist in practice. [p. 4]

* * * *

"Three types of referendum likewise are found in state practice, if we follow the correct definition of the term referendum. *That used with greatest frequency is known as the compulsory referendum. This type has been in use since the beginning of state government in California* and sometimes is not regarded by the average voter as a referendum. Measures such as constitutional amendments and bond issues proposed by the legislature must be placed before the voters and approved by a majority of those voting on each proposition. This does not require any petition. * * * [p. 5]

"Types of direct legislation in local governments differ slightly from those in state-wide practice. * * * The compulsory referendum applies to charter amendments proposed by the local legislative body, bond issues, and, in a few places, to the granting of franchises. * * *" [p. 6]

Crouch (p. 7) notes a city charter provision requiring a referendum before public lands may be granted away. Thus, as a broad generalization, California provides for the automatic or compulsory referendum in three types of situations: (1) in matters involving disposition of public property, (2) in matters involving creation of fiscal burden on *the general taxpayer*, and (3) in distribution of the powers of the sovereign people among their several agencies including themselves. By contrast, the petition referendum was introduced under the governorship of Hiram W. Johnson for matters involving the exercise of the police power, that is, regulation by law of the duties and conduct of the citizenry.

The Charter of the City of San Jose provides that no property used as a public park may be discontinued without a vote of the

public upon an automatic referendum.[16] Illustrative of type 2 is the basic policy of California that no bonded indebtedness can be incurred by either the State or any city, county or school district without an automatic referendum (Cal. Const. Article XIII, Sec. 40; formerly Art. XI, Sec. 18). There are several examples of type 3. The Constitution of California can only be amended by automatic referenda (Art. XVIII, Sec. 4, formerly Sec. 1). Local charter governments can be formed only on automatic referenda (Art. XI, Sec. 3(a), formerly Sec. 8(e)), and they are normally amendable only by automatic referenda (Art. XI, Sec. 3(a), formerly Sec. 8(h)). Territorial annexations require automatic referenda (Art. XI, §§ 1(a), 2(b), formerly 7½b, 8½).[17] California's statute books are full of legislation first enacted by the initiative process, and no law so enacted can be amended or repealed except by vote of the electorate (Cal. Const. Art. IV, Sec. 24(c)). It is no answer for Valtierra to call these "extraordinary matters" (fn. 29, p. 32); that is merely a euphemism for the basic principle that classification of different matters differently is not unconstitutional.

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16. San Jose Charter: *"Section 1700. Parks.* Except as otherwise provided elsewhere in this Charter, the public parks of the City shall be inalienable unless otherwise authorized by the affirmative votes of the majority of the electors voting on such a proposition in each case; provided and excepting, however, that the same or any interest therein, or any concessions or privileges therein or in any building or structure situate therein, may be leased by the Council, or the Council may grant permits or licenses for the same, without any vote of any electors, if the term of each such lease or permit does not exceed three (3) years. As used herein 'public parks' means any and all lands of the City which have been or are dedicated, improved and opened to the public for public park purposes."

17. In *Adams v. City of Colorado Springs,* 399 U.S. 901 (1970), affirming *per curiam* 308 F.Supp. 1397 (D.Colo.), a state statute denying referendum to the voters of territory to be annexed by an adjacent city while granting it to other annexations was held not violative of the equal protection clause.

It is at once evident that an Article XXXIV referendum partakes of types 1, 2 and 3. It is of type 1 because it concerns the disposition of public property. It is of type 2 because the fiscal burden on a locality from low-rent housing falls on the general taxpayer and remains that kind of burden for 40 years, as we amplify at pages 30 to 31 infra. It is of type 3 because it involves retention by the people of that part of sovereignty having to do with protecting the quality of the environment from the uses of public funds and public property, as we amplify at pages 31 to 33 infra.

Moreover, the fact that Article XXXIV provides for referenda without a petition has been deemed of no practical significance by the California Constitutional Revision Commission. That Commission was established in 1963 and is engaged in reviewing the constitution and recommending revisions, not for the purpose of changing substance but to simplify expression and relegate detail to statutes.[18] Describing its work and its recommendations, the Commission has represented to the public that in "no case do we lose any rights or privileges now guaranteed by the Constitution. Revision removes only redundant material, vague phraseology, 'whereofs,' 'therefores,' and other unnecessary language."[19] Again it has said, "Substance is improved by retaining only our basic political concepts, the framework of government, and protection of the rights of the people."[20] In March 1970, this Commission

18. Created by Assembly Concurrent Resolution No. 77, 1963 Stats., Regular Session, Ch. 181; No. 7, 1963 Stats., First Extraordinary Session, Ch. 7. Res. 77 recited that the State constitution had grown to over 70,000 words as compared to 7500 of the federal constitution, and that "A constitution should contain only the basic and fundamental law of a state, rather than being filled with detailed and statutory material".

19. Pamphlet, "A Move to Improve," issued by Constitution Revision Commission, 1062 State Building, San Francisco, California 94102, containing proposed revisions appearing on the June 2, 1970 ballot.

20. Pamphlet, "4 Proposals for Constitutional Revision," on the ballot of November 1970.

officially recommended reducing Article XXXIV to one sentence reading:

> "A low-rent housing project may not be developed, constructed or acquired by a public body unless first approved by the governing body of the county or city where situated. Approval is subject to referendum."[21]

This revision would bring the subject within the general referendum provisions and reflects the view of the Commission that it works no fundamental change.

Affirmance of the judgment in this case on the ground that Article XXXIV provides an automatic referendum would be an exercise in legal calisthenics, for it would be either an idle act or an unnecessary one. If the people of California no longer favor the principle of a public vote on low-income housing, they would repeal Article XXXIV if the matter were put to them. If they still favor the principle, the revision of Article XXXIV recommended by the Constitution Revision Commission would then be adopted to replace a voided Article XXXIV. Then our adversaries will be back in court, assailing the requirement of any public vote at all. *That is the basic question; the argument about an "automatic" referendum is pure diversion.*

A contrived argument is made that the burden to conduct a political campaign is somehow placed "upon the poor, who are least able to finance a popular electoral campaign" (Valtierra 31; Housing Authority, 12, 13). Our opening brief (pp. 57, 58) pointed to the fallacy of defining those who desire low-income housing as a "group" characterized as the "poor." Such housing is warranted and has been upheld because it serves the interest of the whole of society; otherwise it would be invalid as a gift of public funds to private parties. Pro-housing forces are widespread,

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21. Page 67 of Proposed Revision of the California Constitution, 1970, Part 2, California Constitution Revision Commission (Suite 1065 State Building, San Francisco), transmitted to the Joint Committee on Rules, March 10, 1970.

formidable, strong and well-financed. Nothing demonstrates that fact more vividly than the array of organizations that sought to file *amici* briefs for affirmance here, a veritable "poverty-industrial complex". There are the massed phalanxes of federally financed agencies, organized labor, builders, building manufacturers, housing organizations, and civil rights organizations. In the pull and haul of forces competing for the vote of the electorate the partisans of public housing and their opponents represent democracy at work. To say, therefore, that here "what is being denied to the poor is a right of access to normal political channels" (Valtierra, 42) or right of "access to the ordinary law-making processes of government" (Valtierra, 26) is sheer hyperbole.

No burden is placed on proponents of low-income housing to obtain signatures to get the proposal on the ballot; the adoption of the program by the governing body of the locality places it on the ballot. Conversely, the task of those opposing the project is not materially eased, for any practical purpose, by not requiring a petition. A petition need be signed by only 5% of the voters to bring a state statute to referendum; the Charter of the City of San Jose specifies only 8% to bring an ordinance to referendum (Valtierra, 29; Housing Authority, 14). Our adversaries' reiterated complaint is that the public is so opposed to low-income housing that it votes projects down. If public feeling is correctly so described, it would be pure routine to obtain the necessary signatures to a petition. Crouch (see footnote 7, supra) points out that "A perusal of the election results since 1912 indicates that every measure placed upon the ballot by petition, no matter how thoroughly defeated, has polled several times more votes than the number of signatures required to place it on the ballot." [p. 14] Conversely, if opposition to a project is so slight that sufficient signatures were unobtainable if required, the project will not be defeated at the polls.

Before Article XXXIV can be outlawed as violative of Equal Protection because an Article XXXIV referendum is automatic,

it must be shown that this is an irrational classification. Thus the case returns to the only pertinent inquiry, which we now proceed to consider further.

B. Article XXXIV Creates No Discrimination Between the Members of Any "Class", However Described

The one brief which essays in any orderly way to describe how "Article XXXIV fails to accord similar treatment to all * * * members" of some supposed class is that of Housing Authority. By arranging our reply around that presentation, with reference to the others, we answer all. Housing Authority concedes (19) that "The court below selected as the similarly situated class all who would benefit from other types of federally funded local projects." But Housing Authority has so little faith in that reasoning that it conjures up three other "classes" and ranks the lower court's "class" in third place of importance among the four.

1. ALLEGED CLASS ONE

The first "class" postulated by Housing Authority is "all who seek to regulate the real estate market in their favor" (Br. 8, 17). This means nothing unless it is intended to mean that *all* governmental action respecting real estate in any of its numerous forms, aspects, and relations to man and society must be regulated in the same way; in short, that the fundamental principles of classification under the Equal Protection clause do not apply to real estate. For this extraordinary proposition *Hunter v. Erickson*, 393 U.S. 385 (1969) is cited because it contains the phrase, "those who sought to regulate real property transactions". But what *Hunter* contrasted was the distinction drawn by the Akron charter amendment "between those groups *who sought the law's protection against racial, religious or ancestral discriminations* in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends" (p. 390). We have described the rationale of *Hunter* at pp. 17, 18 supra and refer to that discussion.

2. ALLEGED SECOND CLASS

The second "class" postulated by Housing Authority is "those who would benefit from all types of public housing constructed or acquired by the State" (pp. 8, 18). *But there is no State supported public housing in California except low-income housing.* Arguments like Valtierra's (p. 52) that "Article 34, notably, requires no vote on *rich*[22] constructions" are pointless because the State of California does not aid rich constructions.

Our adversaries' argument relative to this supposed second "class" falls into three types.

(a) Complaint against the United States

Under our dual system of government there are areas of affairs where the United States may legislate directly upon the people or offer its bounty or aid directly to them without the intermediary of the States. But the United States did not choose to provide for low-income housing without the intermediation of the States. By the Housing Act of 1937 it chose to channel its aid to people of low-income groups by offering assistance to States. On the other hand, it chose to aid middle income housing directly. The aid to middle-income groups is in the form of various FHA mortgage insurance and subsidy programs, all examples of federal action operating directly upon the people or through private mechanism. The briefs of our adversaries dwell on this *federal aid to middle-income housing* and complain of inequities in a system wherein federal housing subsidies are made available for the "poor" only on local vote but are available to those of higher income without that approval (e.g.; Housing Authority, 20-21; Valtierra, 60-62). The difference lies in what Congress has done. Perhaps an Equal Protection charge lies against the United States for extending aid to middle-income groups directly but to low-income groups only by way of offers of assistance to the States. But that is not the charge of this case. *Neither the State of California nor its political sub-*

22. Emphasis in original.

divisions participate in aid to middle-income housing. Those discontented with these diversities should direct their grievance to Congress. In fact, Congress has already turned to programs of direct aid to those of low income. The Rent Supplement Program and the Section 236 program (see O.B. 40, 41) involve housing privately built, owned and managed with FHA financing or with direct interest subsidies.

(b) Speculations about the future

The gist of our adversaries' second type of argument is that *some* day California *might* supply housing to those of middle income (Valtierra 34, 35). It is admitted that "public housing currently *in existence*[23] in California is low cost public housing", but it is said that other kinds of public housing "*can be* developed in California" (Housing Authority, 18). But the time to raise an argument of unequal protection will come only if and when California should provide middle-income housing. It may never do so. Or, when it does, (a) it may write into its statute provisions like Article XXXIV, or (b) amend Article XXXIV to cover middle-income housing, or (c) the factual circumstances may support different treatment.

In their search for "discrimination", appellees point to California statutes providing aid to housing for *agricultural labor* for which a public vote is not required (*e.g.*, Valtierra 34; Housing Authority 19). But this certainly is no support for a claim of discrimination against the "poor" or against racial minorities. Agricultural laborers are "poor". In common knowledge, agricultural labor is composed largely of members of minority groups, in California Mexicans or Mexican-Americans. The charge of "discrimination" thus becomes one, not of discrimination against the "poor," but of diverse treatment as between two categories of poor, those who are not agricultural labor and those who are. Obviously, a multitude of considerations may warrant different classi-

23. Emphasis in original.

fication here. And since the classification *is not against race, color, or "poor"*, it is not one of the "suspect" which require that "exacting judicial scrutiny" appellees invoke (e.g., Valtierra, 42).

Moreover, if this be the claim, it should have been made and tried out in the District Court where evidence could have been adduced on the subject to enable a judgment to be made about the reasonableness of the classification.

Valtierra (fn. 35, pp. 34, 35) and Housing Authority (p. 18) refer to a California Act of 1968 relative to *urban renewal* and argue that middle income housing could be provided under this Act *although none yet has*. Moreover, the thrust of the urban renewal act is the elimination of *blighted areas*, a classification wholly different from anything under consideration in this case. We reviewed California *urban renewal* legislation in our opening brief (pp. 48, 49) and showed that it *is* subject to voter review, some automatic and mandatory.

(c) Comparisons with regulation of private property

Our adversaries say that state law does not require voter approval of high-rise luxury apartments having undesirable features or of cement plants or shopping centers (Valtierra, 33, 52) or some kinds of zoning decision (Housing Authority, 37). *But none of these involve public construction or public aid.* They involve a different aspect of government authority, zoning laws and regulations, which come under the police power to regulate the use of private property. Perhaps it might be sound policy to let the citizenry have a veto over zoning decisions. But to place the regulation of private property in one classification and provision of public housing in another is not arbitrary or subject to challenge as reaching into "suspect" areas. The rule applicable to this kind of classification is that of *Dandridge v. Williams*, 397 U.S. 471 (1970).

In similar vein our adversaries argue (Housing Authority 34, 35) that the tax exempt status of public housing is no basis for

requiring voter approval because libraries, schools, museums, religious purposes, and so on, have tax exemption under various statutes or constitutional provisions. This kind of argument would drive courts into the bottomless quagmire of measuring differences between countless statutes. It recalls Mr. Justice Holmes' remark in *Buck v. Bell*, 274 U.S. 200, 208 (1927) that the Equal Protection clause "is the usual last resort of constitutional arguments."

3. ALLEGED THIRD CLASS

The third "class" postulated by Housing Authority is "all who would benefit from federally funded state or local projects" (p. 19). This, as just seen at p. 24 above, is the only "class" the court below conceived. That court cursorily purported to find a contrast between how California acted toward federal aid for low-income housing and how it acted toward federal aid for "highways, urban renewal, hospitals, colleges and universities, secondary schools, law enforcement assistance, and model cities." Our opening brief exposed that reasoning as quite without substance (O.B. 45-52). None of our adversaries really tries to sustain it. Instead, they cast about for a variety of other reasons, never mentioned in the case below (e.g., Valtierra, p. 33).

Housing Authority disavows that it claims that either all or none of the federally funded local projects must be submitted to voter approval (pp. 19, 20), but it claims that to warrant different treatment there must be "a compelling state interest". We have answered that argument at pp. 10-16, supra.

(a) Fiscal considerations

Our opening brief (at pp. 33-35) discussed the fiscal considerations that both prompted adoption of Article XXXIV and justify it constitutionally, and we pointed to California public policy since 1879 that major public indebtedness may not be incurred without approval by the voters.

Our adversaries are not consistent in their response. Housing Authority tries to deny or belittle the fiscal burdens imposed on

the locality by a public housing program.[24] Valtierra, however, (p. 47) concedes, "we do not deny that they exist" but tries to sweep them under the rug by arguing that they "do not differ in either nature or degree" from other costs of local government (p. 47) and that the federal government considers them to be "a reasonable and necessary contribution by the local government" (p. 11). They are indeed "necessary" if a project is to succeed, and they may be "reasonable" if the locality chooses to participate. *But that is why the voters of the locality should have the final voice on whether to participate.* The *amicus* (N.Y. 13) indulges in tentative speculations that *"it can be argued* with considerable cogency" that maintaining inadequate housing "is likely" to cost the community more than its contributions to new housing in terms of proneness to fire and breeding of crime. Anything "can be argued". But more than hazarding speculations about possibilities is necessary to overcome the judgment of the State in creating classifications; he who assails a classification must demonstrate its irrationality.

Since existence of the fiscal burden on the community cannot really be denied, our adversaries next argue that the California policy that public indebtedness be not incurred without prior voter approval is not applicable because California Constitution Article XIII, Sec. 40[25] has been judicially construed as applying only to bonded indebtedness constituting a general obligation and not to revenue bonds or obligations payable from special funds or other ingenious devices like sale-leaseback (Valtierra 49, 50; Housing Authority, 32). That is not only no answer; it demon-

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24. Housing Authority, 6, says: *"No local funds* are used; the development and construction costs are borne completely by the federal government and by the tenant of the housing units". (Emphasis in original) This is almost a verbatim copy of a statement on Valtierra's motion to affirm (quoted at O.B. 34, 35) which we demonstrated to be "either naive or uncandid." (O.B. 34, 35) Its repetition now deserves stronger characterization.

25. Until June 1970 this was numbered Art. XI, Sec. 18, and is so referred to in our opening brief.

strates the very reverse. In 1879, when the California constitutional prohibition of incurring debt without prior public approval was adopted, indebtedness constituting a general obligation was *the* way public indebtedness was incurred. Our opening brief observed that, as time passed, the ingenuity of politicians and financiers created "new or ingenious devices" to which the words of the Constitution of 1879 did not fit, thus eluding the state constitutional controls, and that as this has happened the public has sometimes enacted measures to regain control (O.B. 34). Valtierra falls into a non-sequitur in arguing (pp. 50, 51) that the 1939 decision of the California Supreme Court, holding bonds of housing authorities not subject to Art. XI, Sec. 18, was not an "erosion", because other decisions have exempted other situations. The authors of Housing Authority's brief, partners in the largest law firm in California, understand California's history better; they admit that the new financing methods were held not subject to Art. XI, Sec. 18 "because the words of the 1879 Constitution did not fit new or ingenious devices" (Housing Authority 32, 33).

It was to rectify this erosion *with respect to low rent public-housing projects* that Article XXXIV was adopted, to bring housing back within the traditional controls. It may be that "new or ingenious devices" affecting other matters have not been restored to the traditional controls. But must California restore everything to the traditional controls before it can restore anything? Must it catch all before it can catch any? This is but a specific application of the fundamental (O.B. 54) that the Equal Protection clause does not "forbid[] a State from requiring voter approval of anything unless it requires voter approval of everything" and (O.B. 57) that the judgment below rests on a notion of law that gives voters but two choices, "either not to act at all when an abuse comes to their attention or else to devise an all-inclusive body of regulation that would cover all possible situations that acute minds might later think to be similar."

Moreover, most of the examples where Article XIII, Sec. 40 (former Art. XI, Sec. 18) has been held not to apply are situations where the fiscal burden does not fall on the general taxpayer but is paid only out of revenues of special operations or special funds.[26] *But the fiscal burden falling on a locality from low-rent housing falls on the general taxpayer,* and does so for 40 years (O.B. 34, 35). *Cipriano v. Houma,* 395 U.S. 701, 705 (1969), one of Valtierra's citations, recognizes the unique interest of all taxpayers in the right to vote to prevent *any kind* of *general* monetary burden from being incurred.

(b) Non-fiscal considerations

Discussing the non-fiscal consideration why voters should have the final word, our opening brief (pp. 35-38) noted that the history of low-income housing under the federal Housing Act had led to much disillusionment, and we spoke of "institutional design and mammoth size". We could have pointed to Pruitt-Igoe in St. Louis, an excruciatingly embarrassing example to public housing advocates of the failure of public housing.[27] The purpose of our discussion was to note that

> "Public housing can have major sociological effects. *Voters are entitled to a direct voice in decisions which alter the characteristics of their very environment for generations.*" (O.B. 38; emphasis in original)

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26. See fn. 56, pp. 50, 51 of Valtierra brief.

27. In the spring of 1970 a citizens' alliance ended a rent strike that nearly forced the St. Louis Housing Authority into bankruptcy. An Associated Press News Special, dated April 27, 1970, entitled "Crisis in Public Housing", discloses that the vacancy rate at Pruitt-Igoe was 50%, that even the poor refused to live in such projects, that the vacancies cost the Housing Authority $500,000 in 1968, and that a Civil Alliance for Housing hopes to turn over the ownership and management of St. Louis' nine projects to tenant cooperatives, thus placing low-cost housing in the private sphere. The World (San Francisco Chronicle,) Sunday, Nov. 15, 1970, carries a long dispatch from New York Times Service entitled "The Case Study of a Housing Failure", i.e. Pruitt-Igoe.

Appellees' response to this is a miscellany of avoidance. With some fencing,[28] the brunt of the reply is that housing experts *now* recognize the undesirability of institutional housing. They say that *in 1968* Congress ordered that HUD not normally approve high-rise projects, and that in *1969* HUD announced that it had "moved away from the massive, monolithic buildings of the past [and is] now * * * emphasizing small projects and individual units". They say that by enactment *in 1968* Congress emphasized the need of good design related to the architectural standards "of the neighborhood community in which it is situated, consistent with prudent budgeting" (Valtierra 53, 54; Housing Authority, 36).

Did Article XXXIV thus become unconstitutional in *1968* or *1969* because at long last, 18 and 19 years after Article XXXIV was adopted, housing "experts" caught up with voter wisdom? Now that experts have caught up with the electorate as to this aspect of public housing, has the right of the electorate to be heard been superseded by the superior expertise of administrative officials or of elected officials subject to pressure groups such as the mass of organizations that sought to appear in this case as *amici*?

Numerous considerations remain on which the public is entitled to the last word. For example, today San Francisco is torn in controversy over massive high-rise buildings threatening to alter the unique characteristics of that City; experts are for and against. The very fact that Congress has recognized the need of "good design related to community standards consistent with prudent budgeting" is all the more reason why the people in the community should have a right to pass on whether the

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28. Appellees counter that the project voted down in San Jose was for dispersal of small units (Valtierra, 54, fn. 61; Housing Authority, 36). But our brief stated that fact (O.B. 37, fn. 24) and noted its irrelevance because "the judgment below is not limited to San Jose. It outlaws Article XXXIV throughout the State. [The facts] show the variety of considerations an electorate may legitimately consider."

standards are met and what is prudent budgeting in the circumstances.

In still another way, our adversaries' arguments raise the question whether it is claimed that what was constitutional when adopted in 1950 has become unconstitutional now. This case rests on assertions about the racial makeup of California. Census data of the 1970 census are not yet available. Data reported for 1967 show that the sum of Negro and Spanish-surname population of California was 18.3% of the total population.[29] It is from data such as this that appellees try to squeeze a case. But in 1950 the sum of the Negro and Spanish-surname population was 11.6% of the total population, a percentage less than the 1967 percentage by roughly half of that figure.[30]

4. ALLEGED FOURTH "CLASS"

Housing Authority's fourth "class" is "all who benefit from federal financial assistance to housing" (Housing Authority, 8, 20). But all federal assistance to moderate income housing is made directly by the federal government without intermediation of the State (see p. 25, supra).

IV.

THE CASE MUST BE DECIDED ON THE FACE OF ARTICLE XXXIV

Our opening brief submitted that the district court declared Article XXXIV unconstitutional purely on its face, as an abstract textual conclusion reached by laying it alongside the 14th Amendment (O.B. 14), that summary judgment can be affirmed only if the unconstitutionality follows *per se* from *that* kind of

29. Financial and Population Research Section, California State Department of Finance, Sacramento, August 27, 1968.

30. U.S. Bureau of the Census: U.S. Census of Population, 1960, Vol. I, part 6, California, Table 15 gives the data for Negroes. Californians of Spanish surname, State of California, Department of Industrial Relations, Division of Fair Employment Practices, San Francisco, May, 1964, p. 11, gives the data for Spanish surname.

comparison, and therefore that it cannot be supported by alleged statistics. Our adversaries' response is various and inconsistent.

For example, when we pointed out (O.B. 36) that the history of low-income public housing was disfigured by mammoth institutional installations, Valtierra responds (p. 54) that the particular project voted on in San Jose was not that kind. Inconsistently, in response to our statistics tending to show that in the City of San Jose and its county poverty does not equal race (O.B. 30), our adversaries rejoin that the local situation is not relevant because the constitutionality of Article XXXIV is a state-wide matter (Valtierra, 65, 66; Housing Authority, 23). Then, more inconsistently they flood the briefs with alleged data relating to the whole nation.[31]

When we point out that the vast majority of low-income housing projects has been approved by California voters (O.B. 28, 29), Valtierra (p. 71) appeals to *ex parte* hypothesis that projects may never have been proposed by local authority for fear that they would be rejected. (The crumb of truth in that hypothesis is that knowledge that a project will go to public vote leads housing authorities and local governing bodies to act more prudently and to heed less supinely clamor of special interests. This restraining influence is one of the great virtues of the referendum device praised by observers. Crouch, The Initiative and Referen-

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31. Appellees from time to time refer to statistics about San Mateo County and seek to justify that course by erroneously asserting that this case originated as two separate actions, *Valtierra v. City of San Jose*, and *Hayes v. County of San Mateo* (Housing Authority, 4). Those two suits did not become one; consolidation below, *ex mero motu*, did not make them one. Consolidation does not merge identity of cases (Moore's Federal Practice (2nd ed.), § 42.02, pp. 42-21, 42-22). All defendants in the San Mateo suit defaulted (A. 160, Valtierra, 18), and no appeal was taken in it. Since the motion for summary judgment here did not specify that it relied on any part of the *Hayes* record (O.B. 13), none of the *Hayes* record is part of the record here.

Valtierra's assertion (p.21) that appellants reproduced the *Hayes* record in the Appendix is disingenuous. This Court's Rules 17 and 36 require a single appendix to contain what all parties request; it was appellees who included *Hayes*. That does not make it part of the record.

dum in California, p. 29). When we point out that the incomplete statistics the district court referred to in its opinion had never been offered in evidence or authenticated but were merely an attachment to a brief (O.B. 28, fn. 14), Valtierra retorts (p. 74) that the document gains authenticity from the fact it was presented to the California Constitutional Revision Commission by a private group. But Valtierra rejects as unauthenticated our reference to a study submitted to the City of San Jose itself at its request by Kaiser Engineers (Valtierra, 65).

In objecting to statistics and data in our opening brief as not in the record and in asserting that defendants had every opportunity "to submit material for the record on summary judgment" (Valtierra, 21, 65; Housing Authority, 23),[32] appellees ignore our statement (O.B. 30):

> "If this case involved private interests alone and were truly an adversary contest, failure of defendants to respond to the motion for summary judgment adequately might possibly preclude reliance in this Court on matter not in the record. *But this is not a private controversy.* It involves the very factor which lies behind the direct appeal from a judgment of a three-judge court—'procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy', *Phillips v. United States,* 312 U.S. 246, 251 (1941)."

Inconsistently appellees sprinkle their briefs with presumed statistics not in the record.

If *any* of the facts the statistics are supposed to establish are relevant, a summary judgment below and proliferation of statistics in the briefs above constitute an unpardonable way to test and weigh them. Housing Authority (23) criticizes our statistical

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32. Valtierra argues (p. 21) that appellant Shaffer could have offered data below. But Mrs. Shaffer, as one of the city councilmen, was represented by the City Attorney's office. When realization came to her at the time the hasty appeal was taken that the City Council wished to lose the case, she obtained new counsel.

presentation on the ground that "isolated and selected statistics from different reports and affidavits" are combined to misleading conclusions. But precisely our point is that statistics and experts' opinions require acute scrutiny. Our statistics were presented to show how untrustworthy were Valtierra's *ex parte* data below, acquiesced in by Valtierra's fictitious adversary, Housing Authority. Statistics and opinion evidence can be safely used only under the testing of a plenary trial.

Appellees prevailed on a summary judgment. That judgment must be reversed unless required from the bare inspection of Article XXXIV.

V.

ANSWER TO THE SUPREMACY ARGUMENT

Valtierra finally seeks to support the judgment by an argument which the court below rejected as unpersuasive, i.e., that Article XXXIV is invalid under the Supremacy Clause.

In areas where the central government has power to legislate directly upon the people or to reach its hand to them directly without the intermediary of the State, and where it exercises that power, no state may veto or hamper its action. Where the United States confers a right, no state may punish or impede its exercise. That is all that is held in *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), cited Valtierra, p. 69.[33]

But in the present case the central government has not purported to exercise any such power. It has not commanded that there be low income housing; in that area it has not seen fit to act directly upon the people. Contrary to Valtierra's assertion (p. 6), by the Housing Act of 1937 the United States did *not* declare it to be its policy to alleviate or remedy housing conditions. The policy it declared was *"to assist the several states and their politi-*

33. In *Nash* the United States conferred a federal right to appeal to the National Labor Relations Board, and Florida was denied the power to obstruct that appeal.

cal subdivisions" to do so.[34] What the United States has done is to offer financial assistance to the States, which they are free to accept or not as they wish. It cannot order them to accept the aid and put a program into effect. *And if it could, it has not.*

Congress has the power to prescribe the minimum acts of acceptance without which it will withhold its assistance in federally assisted projects. But it cannot deny to the States the power to determine whether and how to accept the assistance. *And if it could, it has not.*

Congress can prescribe that, *if* its assistance is accepted, it must be passed on to those people who it commands shall receive it, and if the State sees fit to accept the assistance, it must honor the terms of the grant. That is all that is held in *King v. Smith,* 392 U.S. 309 (1968) and *Thorpe v. Housing Authority,* 393 U.S. 268 (1969), cited Valtierra, p. 69.[35]

It is within the area of power of the United States to fix the terms upon which it offers its aid to the States. It is within the area of power of the States to fix the terms on which they will accept the offer. If the exercise by each of *its* power produces accord, there is a federally-aided program; otherwise not. If an accord is reached, the State must abide by the terms of the accord. If Congress purported to act within the States' area, a supremacy question would arise. But Congress has not purported so to act. There is no conflict, and no supremacy question.

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34. The Act is quoted in the appendix to the Valtierra brief.

35. In *King v. Smith,* Alabama accepted the federal government's program for Aid to Families with Dependent Children. The federal government prescribed that the aid must be given to dependent children if a "parent" is continually absent from the home. Alabama was denied the power to withhold that aid by the device of defining as a "parent" one who is not a parent within the meaning of the federal grant. In *Thorpe,* North Carolina accepted federal housing assistance and was denied power to evict a tenant contrary to instructions of the H.U.D. within the latter's statutory competence to impose.

CONCLUSION

It is respectfully submitted that the judgment should be reversed with directions to dismiss the complaint.

Dated: San Francisco, California, December 1, 1970.

MOSES LASKY

Attorney for Appellant
Virginia C. Shaffer

MALCOLM T. DUNGAN
Of Counsel